

Filling the Polish ECtHR judgeship – risking (another) empty seat?

Dominika Bychawska-Siniarska

2020-12-14T10:46:57

The Council of Europe institutions and the international community regularly criticize that national selection procedures for human rights courts judges too often fail to meet standards of fairness, inclusiveness and transparency. A correctly conducted selection of candidates at the national level is a first step toward ensuring that any subsequent process will lead to the election of an appropriate and highly qualified candidate (Article 21 § 1 ECHR).

In the election of judges to the European Court of Human Rights (“ECtHR”) by the Council of Europe’s Parliamentary Assembly, appropriate underlying national procedures play a foundational role. The significance, in turn, of the effective functioning of the ECtHR for the entire European human rights system cannot be overstated. Among other functions, the ECtHR becomes even more valuable, when a domestic judiciary is unable to offer adequate protection to individuals, e.g. because its independence has been tampered by government action.

The Polish government has been invited to submit a list of three candidates for ECtHR judge by 8 March 2021, as the term of Judge Krzysztof Wojtyczek is due to expire on 31 October 2021. On 8 December 2020, a list of three candidates was submitted to the Council of Europe’s Advisory Panel. Polish NGOs have attempted to monitor the selection procedure. This process has been particularly difficult, as the Government, by its modest cooperation with civil society, limited access to crucial information concerning the procedure. At most, it published sparse information on the Ministry of Foreign Affairs (“MFA”) website.

Due to the lack of fairness, inclusiveness and transparency of the procedure, it is likely that the seat of the Polish judge will remain vacant. It is highly probable that the list presented by the government would be based on political affiliation of the candidates and not on their merits.

Concerns around the national selection committee

On 21 May 2020, the Helsinki Foundation for Human Rights (“HFHR”), along with the Polish Supreme Bar Council and the National Bar Association of Attorneys-at-Law, sent [a joint letter to the Minister of Foreign Affairs](#), in which the signatories expressed their concerns over the selection procedure. The selection procedure is governed by an [ordinance](#) issued by the Minister of Foreign Affairs in 2012. The signatories pointed to the following as some of the most important shortcomings:

- There is a great risk of political bias, as all members of the national selection committee come from the executive branch. Therefore, appropriate legislative

actions should be taken to ensure the committee's apolitical nature, especially by safeguarding that the committee members are representatives of the executive, judiciary, legislative and NGOs, as well as legal professions.

- The national [selection procedure must be stable and established](#) in advance through codification and settled practice. Although there was a degree of codification, the practice around the selection process has changed from one election to the other.
- The manner in which potential candidates are interviewed by the selection committee is not regulated with sufficient depth. The MFA ordinance lacks detail, which may lead to abuses and does not guarantee that candidates would be interviewed in accordance with the principle of equal opportunity.
- The domestic process for selecting candidates for the post of judge of the ECtHR is not transparent. It does not require the government to provide the public with any information about the procedure from the moment of the opening of the process to the time the list of candidates submitted to Parliamentary Assembly.
- The domestic procedure does currently not guarantee a gender-balanced composition of the selection committee. The PACE Resolution 1646 (2009) § 5 invites national authorities to ensure that national selection bodies/panels be themselves gender-balanced.

On 30 June 2020, the MFA issued a reply to the joint letter. It expressed its willingness to cooperate with the Bar, NGOs and other entities in distributing the call for applications to the post of judge at the ECtHR. However, the Ministry dismissed almost all of the proposed recommendations, particularly the transparency requirements and the call for the possibility of having outside observers monitor the interviews. The MFA indicated that making any changes to the abovementioned procedure is now impossible as the proceedings are already ongoing.

Changes in the ordinance

Despite the announcement that the Minister's ordinance would not be amended, some changes to the composition of the selection committee were introduced on 2 October 2020. However, despite those changes, all members of the current selection committee are still a part of, or are appointed by, the Polish executive. In addition, there is only [one female member](#), far from a gender-balanced composition. Moreover, the nomination of the committee members, without any public call and accessible selection criteria, may trigger doubts as to their impartiality.

On 20 November 2020, invited by the MFA, HFHR's representatives met with two members of the selection committee. HFHR and other NGO representatives have been informed that at this stage it is too late to implement changes to the composition of the selection committee. This claim is absurd. The MFA did introduce some changes to the national procedure on 2 October 2020, and published an open call for the candidates for ECtHR judges as recently as 9 October 2020. The joint letter was sent to the MFA in May, with ample time to consider its recommendations.

Transparency of the procedure

Current regulations require interviews between the committee and potential candidates for the position of judge at the ECtHR to be confidential. HFHR representatives as well as Polish MPs have been denied permission to act as observers. Although this practice does not delegitimize the procedure as such, it certainly proves that the MFA and the Ministry of Justice do not approve any external supervision over the process. Although we understand that the proceedings before the Advisory Panel of the Council of Europe are confidential and the MFA follows that optic, the lack of access to interviews as the most important phase of the national proceedings provoked that civil society monitoring could not be effectuated. Granting a full transparency of the process could have prevented an eventual emergence of a list based on political motives and not competences and merits.

Nevertheless, the MFA has taken up some measures to make the national procedure more transparent. Responding to the application submitted by HFHR on 16 November 2020, the Ministry sent HFHR a work schedule of the national selection committee. In the past two months, the MFA has furthermore been [publishing information](#) concerning the national selection procedure, including i.a., the number of persons that have applied for the post of judge at the ECtHR; names and positions of selection committee members; and at a later stage, questions addressed during the interviews.

Even though HFHR's application for the publication of the full list of potential candidates was denied, the MFA invited the candidates to voluntarily reveal their participation. The MFA justified its denial with the need to protect applicant's personal data, and the fact that the procedure before the Advisory Panel of the Council of Europe is confidential. Only three candidates out of 17 decided to reveal their identity. All of them being well known professors of human rights and international law, recognized as such by the Polish legal community.

The interviewing process, scheduled for 1 and 2 December, took place *in camera*, without any independent observers. NGOs have been informed by some of the candidates, that the interviews were conducted in a friendly manner. As described on the MFA website, each candidate had time for an introduction of themselves and four questions. Civil society has neither been informed about the outcome of the national procedure, nor the three final names on the list. What is known is that none of the three self-identified candidates were selected. The letters informing individual candidates about their rejection did not provide any justification.

Doubts around the process and the selected candidates

The national selection process is conducted in exceptional circumstances, where the rule of law is consistently being undermined and perpetually in crisis. In such a context, NGOs and organizations of legal professionals are expected to be vigilant

and to exert pressure on the government, to follow best practices in the domestic selection process.

The composition of the selection committee did not guarantee its independence from political influence. According to the [Steering Committee for Human Rights](#), political influence (or the appearance thereof) over the national selection process is central, to undermining independence.

Likewise, the Parliamentary Assembly of the Council of Europe has [urged](#) the governments of member states to set up “appropriate national selection procedures to ensure that the authority and credibility of the Court are not put at risk by ad hoc and politicized processes in the nomination of candidates”. Again, all members of the selection committee are representatives of the executive powers. The only two academics selected to the committee were appointed directly by ministries in an unclear process, which does not provide sufficient safeguards as to their independence. According to a [Memorandum](#) prepared by the Secretary General of the Council of Europe’s Parliamentary Assembly on 4 December 2020 the body responsible for recommending candidates should have a balanced composition, its members should have sufficient technical knowledge and command respect and confidence, and it should be free from undue influence (point 7). The balanced composition raises doubts: no representatives of NGOs or legal professions were offered a seat in the selection committee. Similar concerns have been raised by the Polish Ombudsman in his [letter](#) to the MFA on 9 November 2020.

The guarantees of transparency have been insufficient and contrary to point 8 and 9 of the Memorandum prepared by the Secretary General mentioned above. Despite information published on the MFA website about subsequent stages of the proceedings, as of today, civil society, professional associations or MPs have not had access to the procedure itself, to interviews or to documents – even in an anonymized version. Access to the final protocol (dated 2 December 2020), recording the final votes over the candidates list have been denied to MPs. The MPs that were denied the access are also members of the Parliamentary Assembly of the Council of Europe.

In sum, it is impossible to assess with objectivity, the fairness and equality of the selection proceedings and the final vote, let alone the committee appointment procedure. It seems that Poland failed to learn from the process of selecting the Polish member of the Committee for the Prevention of Torture. The post has sat vacant for almost two years now, while the list of candidates proposed by the Ministry of Justice has already been returned on three occasions. In this case, the national procedure lacked transparency and mirrored, in many ways, the selection procedure outlined above. Rumour has it that the latest denial of the list resulted from the basic fact that no gender balance was guaranteed. It appears as if history might repeat itself for the replacement of the Polish ECtHR judge.

Dominika Bychawska-Siniarska, member of the Board of the HFHR

Krzysztof Jarzmus, lawyer at the Strategic Litigation Program of the HFHR

